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MAJLIS PEGUAM MALAYSIA v. SYED AHMAD IMDADZ SAID ABAS & ANOR

FEDERAL COURT, PUTRAJAYA
ABDUL RAHMAN SEBLI CJ (SABAH & SARAWAK)
ZABARIAH MOHD YUSOF FCJ
B HASNAH MOHAMMED HASHIM FCJ
[CIVIL APPEAL NO: 02(F)-39-05-2022(A)]
9 NOVEMBER 2023

C **Abstract** – *An advocate and solicitor should be given the opportunity to be heard, pursuant to s. 103D(4) of the Legal Profession Act 1976, before the Disciplinary Board makes an order whether to impose a greater or lesser penalty or punishment than what is recommended by the Disciplinary Committee.*

D ***LEGAL PROFESSION:*** *Advocates and solicitors – Conflict of interest – Punishment/penalty – Disciplinary Committee ('DC') found advocate and solicitor guilty of having acted in conflict of interest – Recommended to Disciplinary Board ('DB') that advocate and solicitor be subjected to s. 103C(1)(c)(iii) of Legal Profession Act 1976 ('LPA') and be suspended from practice for two years – DB affirmed finding*
E *of liability but substituted punishment recommended by DC and ordered advocate and solicitor to pay fine and, in default, ss. 103D and 103(1) of LPA shall apply – Whether advocate and solicitor should be given opportunity to be heard before DB makes order likely to be adverse or if DB intends to impose greater or lesser penalty or punishment than that recommended by DC – Whether word 'adverse' in*
F *s. 103D(4) of LPA ought to be read in context of 'greater or lesser' under s. 103D(2) of LPA*

WORDS & PHRASES: *'adverse' – Legal Profession Act 1976, s. 103D(4) – Whether word 'adverse' in s. 103D(4) of LPA ought to be read in context of 'greater or lesser' under s. 103D(2) of LPA*

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The second respondent, a developer, was engaged in a joint venture agreement ('JVA') with Pintar Asiamas Sdn Bhd ('landowner') to develop a piece of land. The first respondent was appointed as the advocate and solicitor and he witnessed the execution of the JVA between the parties as
H well as the power of attorney granted by the landowner to the second respondent. However, the landowner later unilaterally terminated the JVA and, contrary to the terms of the JVA, had entered into a sale and purchase agreement ('SPA') with a third party to sell the land. The said SPA was prepared by the first respondent's firm and the first respondent himself had witnessed the execution of the SPA. This prompted the second respondent
I to lodge a disciplinary complaint with the Disciplinary Committee ('DC'), against the first respondent, alleging that the latter had acted in conflict of interest and conspired to defraud the second respondent. The DC, having

found the first respondent guilty, recommended to the Disciplinary Board ('DB') that the first respondent be subjected to s. 103C(1)(c)(iii) of the Legal Profession Act 1976 ('LPA') and be suspended from practice for a period of two years. The DB affirmed the finding of liability but substituted the punishment recommended by the DC and ordered that the first respondent pay a fine of RM30,000 and, in default, ss. 103D and 103(1) of the LPA shall apply. The first respondent appealed against the order of the DB to the High Court. The High Court allowed the appeal, maintaining the DC's finding of liability and ordered: (i) the fine to be set aside; and (ii) the matter to be remitted to the DB on the grounds that the first respondent be given a reasonable opportunity to be heard before an order that is likely to be adverse against him is made by the DB. Aggrieved by the decision of the High Court, both the appellant and the first respondent appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court and dismissed the appeal. Hence, the present appeal. The primary issue that arose for adjudication was whether an advocate and solicitor should be given the opportunity to be heard before the DB makes an order that is likely to be adverse against him if the DB intends to impose a greater or lesser penalty or punishment than that recommended by the DC.

Held (dismissing appeal; affirming decisions of High Court and Court of Appeal)

Per Hasnah Mohammed Hashim FCJ delivering the judgment of the court:

(1) After stating the reason for the rejection on record, the DB was required, by virtue of s. 103D(3) of the LPA, to make any other order on the finding or recommendation or both, which was deemed just and if necessary, vary the DC's recommendation by imposing either a greater or lesser form of penalty or punishment. Prior to any order made under s. 103D(2) or (3), the DB shall notify the intention to make an order that was likely to be adverse against the concerned advocate and solicitor and give him a reasonable opportunity to be heard, as statutorily required under s. 103D(4) of the LPA. The term 'adverse' as found in s. 103D of the LPA referred to a decision, punishment or penalty that affected the advocate and solicitor in a negative way. Whether a punishment is likely to be adverse or otherwise is very subjective; a minor punishment of a one-day suspension or a nominal fine could be considered as being adverse. Any form of punishment would have an impact on the reputation of an advocate and solicitor and would harm his credibility and standing. Hence, even if the DB decided to impose what it may deem to be a lighter penalty or punishment that was less harsh than that recommended by the DC, the decision qualified as being adverse, triggering the necessity for a reasonable opportunity to be heard. (paras 23 & 25)

(2) Section 103D(4) of the LPA was the final tier for the affected advocate and solicitor to defend himself before the final order was imposed upon him by the DB. If the DB sought to impose a punishment or penalty different from the recommendation of the DC, whether adverse to the first respondent or not, then it should have notified him of its intention to do so and given him a reasonable opportunity to be heard irrespective of whether it was of a greater or lesser penalty or punishment or that was likely to be adverse. (para 26)

Bahasa Melayu *Headnotes*

Responden kedua, pemaju, terlibat dalam satu perjanjian usaha sama ('PUS') dengan Pintar Asiamas Sdn Bhd ('pemilik tanah') untuk membangunkan sebidang tanah. Responden pertama dilantik sebagai peguam bela dan peguam cara dan dia menyaksikan pelaksanaan PUS antara pihak-pihak dan juga surat kuasa wakil yang diberikan oleh pemilik tanah kepada responden kedua. Walau bagaimanapun, pemilik tanah, secara sebelah pihak, kemudian menamatkan PUS dan, bercanggah dengan terma-terma PUS, telah memeterai satu perjanjian jual beli ('PJB') dengan pihak ketiga untuk menjual tanah tersebut. Perjanjian jual beli tersebut disediakan oleh firma responden pertama bahkan responden pertama sendiri yang menyaksikan pelaksanaan PJB itu. Ini mendorong responden kedua membuat aduan pada Jawatankuasa Tatatertib ('JT') terhadap responden pertama, menyatakan bahawa responden pertama bertindak bercanggah dengan kepentingan dan berkomplot untuk menipu responden kedua. Jawatankuasa Tatatertib, susulan mendapati responden pertama bersalah, mengesyorkan pada Lembaga Tatatertib ('LT') agar responden pertama dijatuhkan hukuman bawah s. 103C(1)(c)(iii) Akta Profesion Undang-undang 1976 ('APU') dan digantung amalannya untuk tempoh dua tahun. Lembaga Tatatertib mengesahkan dapatan liabiliti tetapi menggantikan hukuman yang disyorkan oleh JT dan memerintahkan responden pertama membayar denda berjumlah RM30,000, jika gagal, ss. 103D dan 103(1) akan terpakai. Responden pertama merayu terhadap keputusan LT pada Mahkamah Tinggi. Mahkamah Tinggi membenarkan rayuan, mengekalkan dapatan JT bersangkutan liabiliti dan memerintahkan: (i) denda diketepikan; dan (ii) hal perkara dikembalikan pada LT atas alasan supaya responden pertama diberi peluang munasabah untuk didengar sebelum satu perintah yang berkemungkinan memudaratkan terhadapnya dibuat oleh LT. Terkilan dengan keputusan Mahkamah Tinggi, perayu dan responden pertama merayu di Mahkamah Rayuan. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan menolak rayuan. Maka timbul rayuan ini. Isu utama yang timbul untuk diputuskan adalah sama ada seorang peguam bela dan peguam cara wajar diberi peluang didengar sebelum LT mengeluarkan satu perintah yang berkemungkinan memudaratkannya jika LT ingin menjatuhkan penalti atau hukuman yang lebih berat atau lebih ringan daripada yang disyorkan oleh JT.

Diputuskan (menolak rayuan; mengesahkan keputusan Mahkamah Tinggi dan Mahkamah Rayuan)
Oleh Hasnah Mohammed Hashim HMP menyampaikan penghakiman mahkamah:

(1) Selepas menyatakan alasan penolakan dalam rekod, LT dikehendaki, bawah s. 103D APU, membuat apa-apa perintah lain tentang dapatan atau syor atau kedua-duanya, yang difikirkannya adil dan jika perlu, mengubah syor JT dengan mengenakan penalti atau hukuman yang lebih berat atau lebih ringan. Sebelum apa-apa perintah dibuat bawah s. 103D(2) atau (3), LT hendaklah memaklumkan peguam bela dan peguam cara itu tentang niatnya untuk berbuat demikian dan memberi peguam bela dan peguam cara itu peluang yang munasabah untuk didengar, seperti yang diperuntukkan oleh undang-undang bawah s. 103D(4) APU. Terma 'memudaratkan' yang terkandung dalam s. 103D APU merujuk pada keputusan, hukuman atau penalti yang memberi kesan negatif pada peguam bela dan peguam cara. Sama ada satu-satu keputusan itu berkemungkinan memudaratkan atau sebaliknya adalah sangat subjektif; hukuman ringan penggantungan satu hari atau denda yang kecil masih boleh dianggap memudaratkan. Apa-apa bentuk hukuman akan memberi kesan pada reputasi peguam bela dan peguam cara yang terlibat dan akan memudaratkan kredibiliti dan kedudukannya. Oleh itu, jika LT memutuskan untuk mengenakan apa-apa yang difikirkannya satu penalti yang lebih ringan atau hukuman yang kurang berat daripada yang disyorkan oleh JT, keputusan tersebut terjumlah sebagai menjejaskan, membangkitkan keperluan peluang yang munasabah untuk didengar.

(2) Seksyen 103D APU adalah peringkat terakhir untuk mana-mana peguam bela dan peguam cara yang terjejas untuk membela dirinya sebelum perintah terakhir dikenakan terhadapnya oleh LT. Jika LT ingin mengenakan hukuman atau penalti yang berlainan daripada apa yang disyorkan JT, sama ada menjejaskan responden pertama atau tidak, maka LT perlu memaklumkan responden pertama tentang niatnya untuk berbuat demikian dan memberinya peluang yang munasabah untuk didengar tanpa mengira sama ada ini adalah untuk penalti atau hukuman yang lebih berat atau lebih ringan atau berkemungkinan memudaratkan.

Case(s) referred to:
Darshan Singh Khaira v. Zulkefli Hashim; Majlis Peguam Malaysia (Intervener) [2018] 1 LNS 1934 HC ***(refd)***
Jaswinder Kaur Gurbachan Singh v. Mokhtar Singh Lal Singh; Majlis Peguam Malaysia (Intervener) [2017] 1 LNS 591 HC ***(refd)***
Ketua Pengarah Kastam v. Ho Kwan Seng [1975] 1 LNS 72 FC ***(refd)***
Ong Keh Keong v. Lembaga Tatatertib Peguam-peguam [2020] 10 CLJ 181 CA ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 94(2), 103(1), 103B, 103C(1)(c)(iii), 103D(1), (2), (3), (4)

For the appellant - Robin Lim Fang Say; M/s Chan & Assocs
For the 1st respondent - Ahmad Yani Aminuddin & Mior Muhammad Fadhli; M/s Nurul Fadhli & Partners
For the 2nd respondent - Ranjan N Chandran & Vinitha Laksmy; M/s Hakem Arabi & Assocs

[Editor's note: For the Court of Appeal judgment, please see Syed Ahmad Imdadz Said Abas v. Imej Muhibah Sdn Bhd; Majlis Peguam Malaysia (Intervener) [2021] 7 CLJ 125 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Hasnah Mohammed Hashim FCJ:

[1] The appeal before us centres on the application of s. 103D of the Legal Profession Act 1976 (LPA), that is, whether an advocate and solicitor should be given the opportunity to be heard before the Disciplinary Board (DB) makes an order that is likely to be adverse against him if the DB intends to impose a greater or lesser penalty or punishment than that recommended by the Disciplinary Committee (DC).

[2] The questions of law for our determination are as follows:

(i) whether the first respondent (Syed) needs to be given the opportunity to be heard under s. 103D(4) of the LPA when the DB has already reduced his penalty or punishment; and

(ii) whether the word "adverse" under s. 103D(4) of the LPA should be read in the context of "greater or lesser" under s. 103D(2) of the LPA.

[3] On 10 April 2023, after having heard and considered the submissions of the respective counsel for the parties, we dismissed the appeal. We now give our reasons.

Factual Background

[4] The facts are not disputed. The factual background to this dispute was set out in the judge's clear and comprehensive judgment. The second respondent, a developer, complained to the DB that Syed, an advocate and solicitor practicing as a sole proprietor in the firm of Messrs Syed Anuar & Associates in Ipoh, Perak, had acted in a conflict of interest. Sometime in August 2012, the second respondent was engaged in a joint venture agreement (JVA) with Pintar Asiamas Sdn Bhd (the landowner). The second

respondent and landowner agreed to develop Lot 40481, Mukim Hulu Kinta, Daerah Kinta. The 11 acres of land were alienated by the State Government of Perak to develop a housing scheme with 116 terrace housing lots.

[5] Syed was appointed as the advocate and solicitor and witnessed the execution of the JVA between the parties as well as the power of attorney (PA) granted by the landowner to the second respondent. By a letter dated 17 March 2014, the landowner unilaterally terminated the JVA. This termination was disputed by the second respondent, claiming that it was able and willing to perform the obligations to develop the land.

[6] The second respondent subsequently discovered that the landowner who had agreed under the terms of the JVA not to sell the land to any third party had, in fact, entered into a sale and purchase agreement (SPA) dated 9 October 2013 to sell the land to Ken Han Sdn Bhd. This was in contradiction with the obligation of the landowner under the terms of the JVA which prohibited any sale, transfer, and conveyance of the land when the JVA still subsists. The said SPA was prepared by Syed's firm and Syed himself had witnessed the execution of the agreement.

[7] Syed denied he had acted for any party to the JVA and claimed that he was not even privy to the terms of the JVA. His role, according to him, was merely to witness and attest to the execution of the JVA and PA.

[8] Unhappy with the conduct of Syed, the second respondent lodged a disciplinary complaint with the DC on 4 October 2016. The second respondent alleged that Syed had acted in a conflict of interest and conspired to defraud the second respondent by preparing both the JVA and SPA concerning the same piece of land. When the SPA was prepared, the JVA was still valid and subsisting.

[9] The DC conducted an inquiry on 21 February 2018 as required under the LPA. In its report dated 28 March 2019, the DC found Syed guilty of having acted in a conflict of interest in the discharge of his professional duties as an advocate and solicitor and made a finding on liability. Syed had indeed played a major role in the preparation of the JVA. Therefore, any action on the part of Syed in the disposal of the land involved a significant risk of conflict of interest and any attempt to cover up the conflict turns it into misconduct on the part of Syed as the solicitor. The DC viewed that sacrificing the interest of one's client for self-benefit or for the benefit of others is a conduct most unbefitting of an advocate and solicitor. Thus, Syed owed a duty of care to the second respondent. The DC in its report recommended to the DB that Syed be subject to s. 103C(1)(c)(iii) of the LPA and be suspended from practice for a period of two years.

[10] In exercise of the powers conferred under s. 103D of the LPA, the DB affirmed the finding of liability but substituted the punishment recommended by the DC and ordered that Syed pay a fine of RM30,000 payable to the discipline fund within one month from the date of the order and in default, the provisions of ss. 103D and 103(1) of the LPA shall apply.

[11] Unhappy with the DB's decision, Syed appealed against the order of the DB to the High Court. The High Court allowed the appeal, maintaining the DC's finding of liability and ordered as follows:

(i) the fine of RM30,000 is set aside; and

(ii) the matter be remitted to the DB on the grounds that Syed be given a reasonable opportunity to be heard before an order that is likely to be adverse against Syed is made by the DB.

[12] Aggrieved by the decision of the High Court, both the appellant and Syed appealed to the Court of Appeal. The appellant appealed against that part of the decision of the High Court that ordered the fine to be set aside and that Syed be given the right to be heard. Syed appealed against the decision of the High Court on the finding of liability. The Court of Appeal affirmed the decision of the High Court and unanimously dismissed the appeal with no order as to costs. The Court of Appeal was of the view that even if the fine of RM30,000 may be regarded as a lesser punishment or penalty, it is still an order that is adverse to Syed. A lesser punishment does not mean it is not adverse against the advocate and solicitor concerned and, therefore, must be given the right to mitigate before the DB.

Legislative Framework

[13] Before addressing the various questions raised in the submissions, it is necessary to consider the relevant statutory provisions which are in issue in this appeal before us.

[14] Section 94(2) of the LPA provides:

> (2) Any advocate and solicitor who has been guilty of any misconduct shall be liable to one or more of the following penalties or punishments:
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> (a) to be struck off the Roll;
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> (b) to be suspended from practice for any period not exceeding five years;
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> (c) to be ordered to pay a fine not exceeding fifty thousand ringgit; or
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> (d) to be reprimanded or censured.

[15] When there are complaints against an advocate and solicitor, the DC will conduct an inquiry as provided under s. 103B of the LPA:

> (1) the Disciplinary Committee shall, within one month of its appointment, commence its inquiry into the written application or complaint and shall make its findings expeditiously.

(1A) the Disciplinary Committee shall keep a note of the proceedings of the inquiry and submit the findings and the notes of the proceedings to the Disciplinary Board.

(2) for the purposes of any inquiry under sub-s. (1) the Disciplinary Committee may:

(a) require the production for inspection by the Disciplinary Committee of any book, document or paper which may relate to or be connected with the subject matter of the inquiry and may require any person to give information in relation to such book, document or paper;

(b) require such person concerned to give all information in relation to any such book, document or paper which may be reasonably required by the Disciplinary Committee; and

(c) require any person whom it considers necessary to appear before it to give oral evidence relating to or connected with the subject matter of the inquiry.

(3) Any:

(a) advocate and solicitor or any other person who, without reasonable excuse, refuses or fails to produce to the Disciplinary Committee for inquiry any book, document or paper or fails to give any such information relating thereto under para. (2)(a) or (b); and

(b) person who, without reasonable excuse, refuses or fails to appear to give oral evidence under para. 2(c), shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding two thousand ringgit or to a term of imprisonment not exceeding three months or to both.

(4) Before the Disciplinary Committee commences its hearing in respect of any matter, the Disciplinary Committee shall post or deliver to the advocate and solicitor concerned:

(a) a copy of any written application or complaint and of any statutory declaration or affidavit that has been made in support of the written application or complaint; and

(b) a notice inviting the advocate and solicitor concerned, within such period being not less than fourteen days as may be specified in the notice:

(i) to give to the Disciplinary Committee any written explanation he may wish to offer which may be additional to any previous written explanation he may have proffered under section 100; and

(ii) to advise the Disciplinary Committee if he wishes to be heard by the Disciplinary Committee.

A (5) the Disciplinary Committee shall allow the time specified in the notice to elapse and give the advocate and solicitor concerned reasonable opportunity to be heard if he so desires and shall give due consideration to any explanation he may make.

[16] Upon completing the inquiry, the DC shall determine and make B recommendations to the DB as required under s. 103C of the LPA which reads as follows:

(i) upon conclusion of the inquiry, a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine and make any one of the following recommendations to C the Disciplinary Board:

(a) that no cause for disciplinary action exists and that the application or complaint be dismissed;

(b) that cause for disciplinary action exists but is not of sufficient D gravity to warrant any punishment other than a reprimand or censure or that the circumstances are such that the advocate and solicitor should only be reprimanded or censured; or

(c) that cause for disciplinary action exists and is of sufficient gravity to warrant the advocate and solicitor to be subject to one or more E of the following penalties or punishments:

(1) reprimand or censure;

(2) imposition of a fine not exceeding fifty thousand ringgit;

(3) suspension of the advocate and solicitor from practice, or in the F case of a foreign lawyer, recommendation to the Bar Council for suspension of registration, for such period not exceeding five years as the Disciplinary Committee deems appropriate in the circumstances; or

(4) striking the advocate and solicitor off the Roll or in the case of G a foreign lawyer, recommendation to the Bar Council for revocation of the registration of the foreign lawyer;

(ii) the Disciplinary Committee may in appropriate cases in addition to its recommendation of an appropriate penalty or punishment recommend H that the Disciplinary Board make an order of restitution by the advocate and solicitor of the complainant's monies if it is established that such monies were or are held by the advocate and solicitor in his professional capacity and the complainant is entitled to the return of such monies or part thereof.

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[17] Upon receiving the report of the inquiry conducted by the DC, the DB will then deliberate and consider the report and, make the necessary order as it deems fit. Subsection 103D(1) of the LPA states that after considering the DC report, the DB must first make an order to affirm or reject the finding or recommendation of the DC, and in the event the DB so rejects either the finding or recommendation, the DB shall record the reason for the said rejection. If DB decides to affirm both findings and recommendations, the responsibilities of the DB cease at that juncture.

[18] Section 103D of the LPA reads as follows:

> (1) after consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee and if the Disciplinary Board rejects the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall record the reason for the rejection;
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> (2) the Disciplinary Board may in appropriate cases impose a greater or lesser penalty or punishment than that recommended by the Disciplinary Committee;
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> (3) where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other order as it deems just;
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> (4) before the Disciplinary Board makes an order that is likely to be adverse against an advocate and solicitor under sub-s. (2) or (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard;
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> (5) where the Disciplinary Board makes an order that the advocate and solicitor should make restitution to the complainant, it may stipulate the time within which such restitution ought to be made;
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> (6) a sum ordered by the Disciplinary Board under sub-s. (5) to be restituted may be recoverable by the complainant as a civil debt.

Our Decision

[19] The appellant submitted that there appear to be two different approaches in the interpretation of s. 103D(4) of the LPA. In *Jaswinder Kaur Gurbachan Singh v. Mokhtar Singh Lal Singh; Majlis Peguam Malaysia (Intervener)* [2017] 1 LNS 591, the High Court took the view that there is no need for the DB to give any notice as the DB did not impose any order that is likely to be adverse against the advocate and solicitor which is greater than that recommended by the DC. In *Jaswinder* (*supra*) the DB confirmed the DC's recommendation to strike Jaswinder off the Rolls of Advocate and Solicitors.

[20] In *Darshan Singh Khaira v. Zulkefli Hashim; Majlis Peguam Malaysia (Intervener)* [2018] 1 LNS 1934; [2018] MLJU 2191, the High Court took a different approach where it was held that where the DB does not agree with the finding of the DC and seeks to impose a greater or lesser penalty then, the DB is required to notify the advocate and solicitor concerned. This was later affirmed by the Court of Appeal through the judgment of Azizah Nawawi JCA:

> [32] Under subsection 103D(4), the DB is required to notify the advocate and solicitor of its intention to make an order that is likely to be adverse against him under subsection 103D(2) or (3) and give him a reasonable opportunity to be heard. Subsections 103D(2) & (3) is applicable where the DB does not agree with the findings or recommendations of the DC and seeks to impose a greater or lesser penalty or punishment than that recommended by the DC. Therefore, the requirement of giving a reasonable opportunity to be heard to the appellant before the DB makes a decision is when the DB does not agree with the findings and recommendations of the DC.

[21] It was further argued by learned counsel for the appellant that the DB is only required to afford Syed a reasonable opportunity to be heard when the DB enhances the penalty or punishment recommended by the DC. The DC had recommended a punishment of suspension of two years which was not affirmed by the DB but instead imposed a fine of RM30,000 which is obviously a lesser punishment or penalty. The DB was of the view that the DC's recommended punishment of the two-year suspension was too harsh and that a fine of RM30,000 would be just and appropriate.

[22] Learned counsel for the appellant posited that Syed, as an advocate and solicitor, is only entitled to a reasonable opportunity to be heard if the DB had meted out a punishment that is greater than that recommended by the DC and not otherwise. It was submitted that the right of the opportunity to be heard is dependent upon the punishment recommended by the DC and the right to be heard will only arise if the DB intends to enhance the punishment than that recommended by the DC. Furthermore, there is no statutory requirement for the DB to give the appellant an opportunity to be heard to mitigate on the sentence.

[23] After stating the reason for the rejection on record, the DB is required by virtue of sub-s. 103D(3) of the LPA to make any other order on the finding or recommendation or both, which is deemed just and if necessary vary the DC's recommendation by imposing either a greater or lesser form of penalty or punishment. Prior to any order made under sub-ss. 103D(2) or (3), the DB shall notify the intention to make an order that is likely to be adverse against the concerned advocate and solicitor and give him a reasonable opportunity to be heard as statutorily required under sub-s. 103D(4) of the LPA.

[24] The appellant argued that the mandatory requirement for the DB to notify the advocate and solicitor of its intention and to accord him/her a reasonable opportunity to be heard only applies if the punishment is likely to be an adverse order. With respect, we do not agree.

[25] The term "adverse" as found in s. 103D of the LPA refers to a decision, punishment or penalty that affects the advocate and solicitor in a negative way. The Cambridge Advanced Learner's Dictionary & Thesaurus © Cambridge University Press defines 'adverse' as having a negative or harmful effect. Whether a punishment is likely to be adverse or otherwise is very subjective. A minor punishment of a one-day suspension or a nominal fine can be considered as being adverse. Any form of punishment will have an impact on the reputation of an advocate and solicitor and harm his credibility and standing. Hence, even if the DB decides to impose what it may deem to be a lighter penalty or punishment that is less harsh than that recommended by the DC, the decision in our view, qualifies as being adverse, triggering the necessity for a reasonable opportunity to be heard.

[26] Section 103D(4) of the LPA is the final tier for the affected advocate and solicitor to defend himself or herself before the final order is imposed upon him by the DB. If the DB sought to impose a punishment or penalty different from the recommendation of the DC, whether adverse to Syed or not, then it should have notified him of its intention to do so and given him a reasonable opportunity to be heard irrespective of whether it is of a greater or lesser penalty or punishment or that is likely to be adverse. On the issue of 'lesser or greater' punishment, the learned High Court Judge articulated in his grounds of judgment that it is difficult to conclude as to which is a greater or lesser punishment. The High Court ruled, which we agreed, that before the DB intends to impose any punishment, it ought to have given the advocate and solicitor concerned, in this case, Syed, a reasonable opportunity to be heard. The learned judge in para. 57 of his judgment made reference to criminal law and ruled that the advocate and solicitor ought to be given an opportunity to be heard or to mitigate before any punishment is meted out:

> (iii) In *Majlis Peguam v. Cecil Wilbert Mohanaraj Abraham* [2019] 5 CLJ 139, a complaint against Cecil Abraham, an advocate and solicitor, for professional misconduct was lodged by the Bar Council of Malaysia. Balasubramaniam a/l Perumal ("Bala") who was a prosecution witness in the murder trial of Altantuya Shaaribu had, on 1 July 2008, signed a statutory declaration ("SD") where he had *inter alia* implicated Datuk Seri Najib Tun Razak in a relationship with Altantuya but on 4 July 2008 Bala signed another statutory declaration disavowing the entire contents of his earlier SD alleging it was signed under duress. However, Bala in a three-part video alleged he signed the later SD to retract his earlier SD under duress. The complaint of professional misconduct against Tan Sri Cecil Abraham was to call upon the DB to investigate whether he was the

advocate and solicitor who was responsible for or involved in drafting the later SD. It was found that the evidence was not sufficient to make out a case for disciplinary action against Tan Sri Cecil Abraham and the Federal Court held that:

> (2) The standard of proof in disciplinary matters before the BC (*sic*) is one of beyond reasonable doubt similar to that of a criminal proceeding. The respondent, like an accused in a criminal trial, was fully entitled to call upon his armoury of defence available in law to protect himself against the allegations made.
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> (iv) If an accused facing a criminal charge is found guilty, he is entitled to plead in mitigation and in this regard, save for offences that carry a mandatory punishment like for *eg*, capital punishment, all accused are allowed to mitigate; see *Zaidon Shariff v. PP* [1996] 4 CLJ 441 where Augustine Paul J held that:
>
> > *A mitigation plea should not be treated as a ritualistic step to be summarily rejected the moment it is made. It is a constituent element of the sentencing process. It merits due consideration in light of the facts of each case*, and more so when it is not contradicted by the prosecution as in this case.
>
> (v) Wherefore, similar to that of an accused in a criminal trial, the advocate and solicitor ought to be given an opportunity to be heard or to mitigate before any punishment is meted out once the DB accepts the finding of liability by the DC.
>
> (vi) In keeping with criminal law, if there is any ambiguity in the construction of s. 103D(4) of the LPA, any ambiguity must be resolved in favour of the advocate and solicitor and this will mean that the advocate and solicitor must be given a reasonable opportunity to be heard. In *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197 FC at para. [6], the late Augustine Paul FCJ speaking for the Federal Court held that the Court of Appeal was right in saying that a penal statute must be strictly construed and, there is a rule of construction that when there is an ambiguity or doubt in the meaning of a word in a penal statute it must be resolved in favour of the subject.
>
> (vii) Further, with respect, if Parliament meant for such a right to be heard to be only available if the DB were to impose a punishment greater than that recommended by the DC, it could have easily said so in s. 103D(4) when it introduced the words "or lesser" by way of amendment to sub-s. 103D(2) of the LPA which came into effect on 3 June 2014. Parliament did not;
>
> (emphasis added)

[27] The Court of Appeal in *Ong Keh Keong v. Lembaga Tatatertib Peguam-peguam* [2020] 10 CLJ 181 explained with clarity the intent of s. 103D(4) of the LPA:

> [52] Pursuant to s. 103D(4) of the LPA 1976, it was Parliament's intention that an advocate and solicitor be given the right to make a representation before the Disciplinary Board. Such representation should have been

taken into account before the procedure for punishment is finalised, and it is only at the end of this process that the Disciplinary Board must make a decision with respect to the nature of the punishment to be imposed.

[28] It seems rather incredulous for the Malaysian Bar Council, an entity advocating justice without fear or favour and a staunch proponent of the principles of the rules of natural justice to deny its own members the very basic but nonetheless important right of hearing and due process. That, indeed, would be a travesty of justice which should not be countenanced.

[29] It is appropriate at this juncture to remind ourselves of the principles of natural justice as articulated by Raja Azlan Shah FJ (as His Majesty then was) in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1975] 1 LNS 72; [1977] 2 MLJ 152:

> The principles of natural justice that no man may be judge in his own cause and that no man may be condemned unheard today play a very prominent role in administrative law, particularly since the House of Lords invigorated them by a strong decision in *Ridge v. Baldwin* [1964] AC 40. The second principle is the rule requiring a fair hearing. This is of central importance because it can be used to construe a whole code of administrative procedural rights. The principle has a long history. One of the most famous cases is *Bentley*'s case in 1723, in which it was held that the University of Cambridge could not deprive that great but rebellious scholar of his degrees without hearing his excuses for his misconduct: see *R v. University of Cambridge* (1723), 1 Str 557. In *Cooper v. Wandsworth Board of Works* [1863], 14 CBNS 180 damages were awarded against a local authority which demolished a building erected without due notification, although they did only what the statute said that they might do in such circumstances. The essence of this and many other, such cases is that drastic statutory powers cannot be intended to be exercised unfairly, and that fairness demands at least the opportunity of a hearing. The courts clung to this principle as the powers of government expanded, and applied it frequently in many fields such as housing law, compulsory purchase of land and dismissal from public offices. In one case the Court of Appeal has made it clear that the right to a fair hearing applies generally in licensing cases and in particular to an application for a licence for a gaming club: see *R v. Gaining Board for Great Britain, ex parte Benaim and Khaida* [1970] 2 QB 417. In that case the licensing authority had a legal duty arising purely from implication of law, to explain to the applicants what objections they had to meet and to give them a fair opportunity to meet them. The cases show that a fair hearing is required as a "rule of universal application", "founded on the plainest principles of justice." In particular, the silence of the statute affords no argument for excluding the rule, for the "justice of the common law will supply the omission of the legislature." These quotations are derived from the case of *Cooper v. Wandsworth Board of Works*, *supra*, which has several times recently been approved by the House of Lords as expressing the principle in its full width: see *Ridge v. Baldwin*, *supra*; *Wiseman v. Borneman* [1971] AC 297.

> In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', '*quasi*-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that 'judicial methods may ... be entirely unsuitable, and produce delays, expenses, and public and private injury' is too well-known to be side-stepped: see *Local Government Board v. Arlidge* [1915] AC 120, 138. In the last analysis, it depends on the subject-matter. The great need is to deal efficiently and fairly, rather than to preserve all the accoutrements of the courtroom; the considerations of basic fairness are paramount.

[30] Having carefully considered the submissions of all parties, we agreed with the decisions of the High Court and the Court of Appeal. For the foregoing reasons, question i is answered in the affirmative in that an advocate and solicitor should be given the opportunity to be heard under s. 103D(4) of the LPA before DB makes an order whether to impose a greater or lesser penalty or punishment than what is recommended by the DC. Question ii is also answered in the affirmative in that if the DB intends to impose any punishment, it must give the advocate and solicitor a reasonable opportunity to be heard irrespective if it is likely to be adverse or otherwise before imposing a greater or a lesser punishment.

Conclusion

[31] Based on the aforementioned reasons and in the light of the above settled principles, we found no merits in the issues raised by the appellant and unanimously dismissed the appeal with no order as to costs. The decisions of the High Court and the Court of Appeal are affirmed.